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Arbitration of Drug Testing Cases:  
Second Hand Smoke Screens:  
A Search for Science & A Defense

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## I. Overview

The prevalence of drug testing of employees in the private sector has grown to include nearly half of all employers nationwide.<sup>2</sup> In 2001, one drug testing company processed 6.3 million tests, approximately 40 percent of all tests nationwide.<sup>3</sup> As the amount of drug testing has increased so has the number of employee challenges to adverse employment actions based on these drug testing results. This paper examines the availability of defenses to employees, the apparent successfulness (or lack thereof) of the different approaches and makes recommendations as to contract terms that may preserve the rights of employers to terminate risky employees while protecting the rights of employees from unjust discipline.

One of the challenges in any paper on labor arbitration is the wide variance in contract terms, employer response and arbitrator's decision-making. A labor arbitration proceeding is defined by the bounds of the negotiated collective bargaining agreement (CBA).<sup>4</sup> A CBA that provides that the 'being under the influence of alcohol or illegal drugs while on duty' is just cause for dismissal will have a different result than a CBA that provides that "positive results on a drug test" as just cause for dismissal even if the drug test in both cases has the same results.<sup>5</sup> The 'under the influence' CBA will lead to arguments as to whether a positive result shows impairment or simply earlier off-duty exposure, while the second avoids any such concerns.

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<sup>2</sup> SAMSHA, OFFICE OF APPLIED STUDIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, AN ANALYSIS OF WORKER DRUG USE AND WORKPLACE POLICIES AND PROGRAMS, Chapter 6.1 (2002). Other sources list the percentage of employers who drug test their workers as high as 67% (See, *DAITA Will Push for Federal Laws, Release of HHS Guidelines this Fall*, 13 DRUG DETECTION REPORT 3 (2003). The percentage of employers who test depends upon the industry with drug testing occurring in 59% of manufacturing companies, 61% of health care companies, 34% of finance and insurance firms, 32% of retail companies and 16% of educational institutions. (*Are You Spending Too Much on Drug Prevention Efforts*, SAFETY DIRECTOR'S REPORT, Sept. 1, 2002.)

<sup>3</sup> 4.6 percent of the 6.3 million were positive. Martha McNeil Hamilton, *Firms Offer Ways to Foil Drug Tests*, Wash. Post, Feb. 18, 2003 at E1, E2.

<sup>4</sup> *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.")

<sup>5</sup> See, *Southern California Gas Co. v. Utility Workers Union of America, Local 132*, 89 Lab. Arb. (BNA) 393 (1987) (Allyene et al. Arb.) (positive test result for marijuana did not prove use on the job). Cf. *Int'l Brotherhood of*

CBA's also differ on the procedures that will be followed upon a positive result – does a positive result equate to immediate dismissal, suspension with conditions, a last chance agreement, mandatory substance abuse counseling or some other procedure? While each case will therefore be different based solely on the CBA, each drug testing case also presents similar concerns and defenses for the employee.

The Federal government has played an influential role in the development of drug testing programs in the private sector. The United States Department of Defense was the first employer to use drug testing on a routine basis.<sup>6</sup> The federal government has mandated drug testing by various private employers. The Department of Transportation, under the authority of the Omnibus Transportation Employee Testing Act,<sup>7</sup> requires its regulated industries to have mandatory drug testing programs.<sup>8</sup> These regulatory requirements are adopted either into the formal CBA or as part of the industrial common law of the workplace.<sup>9</sup> At times, the unilateral imposition of a drug testing program has itself become an issue in arbitration.<sup>10</sup> In addition to

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Teamsters, Local Union No. 273 v. Penzoil-Quaker State, 1999 WL 1331151 (Arb.) (Neigh, Arb.) ("Under the influence" is defined as the presence of alcohol or drugs in a person's system at a level prohibited by the Company.")

<sup>6</sup> ROBERT P. DECRESE, ET AL. DRUG TESTING IN THE WORKPLACE at 7. (1989).

<sup>7</sup> 49 U.S.C. § 45101 (2003)

<sup>8</sup> The following is list of regulations for some of the agencies: the Department of Transportation for the Federally regulated transportation industry at 49 C.F.R. § 40 (2003), the Federal Aviation Administration for the aviation industry at 14 C.F.R. § 61 (2003), the Federal Railroad Administration for the railroad industry at 49 CFR § 219 (2003), the Federal Transit Administration for the mass transit industry at 49 C.F.R. § 655 (2003), the Federal Motor Carrier Safety Administration for carriers and commercial driver's license holders at 49 C.F.R. § 382 (2003), the Research and Special Programs Administration for the pipeline industry at 49 C.F.R. § 199 (2003), the United States Coast Guard for employers operating commercial vessels at 46 C.F.R. § 4, 5 & 16 (2003).

<sup>9</sup> See, United Public Employees, Local 790 v. City and County of San Francisco, 62 Cal. Rptr. 2<sup>nd</sup> 440 (1997). The employer had included the DOT regulation in its Substance Abuse Policy. The union and the employer had agreed to several Memorandums of Understanding on several discretionary aspects of the employer's drug testing program. (e.g. discipline procedures) The union sought to arbitrate whether a particular employee was in a safety-sensitive position and subject to testing. The employer refused to arbitrate. The union then sought to compel arbitration. The court held that the subject was preempted by the federal Omnibus Transportation Employee Testing Act as it clearly defined the employee's position and duties as 'safety sensitive'. Therefore the issue was outside the scope of the collective bargaining agreement and was not subject to arbitration.

<sup>10</sup> Paul Keneally, Note, *Labor Injunctions Pending Arbitration: Should Courts Enjoin Management's Unilaterally Implemented Drug-Testing Programs?* 60 Fordham L. Rev 1035 (1992).

arbitration decisions, military case law can provide some guidance and a host of published decisions on drug testing cases.<sup>11</sup>

This paper examines some of the common defenses used in labor arbitration and analogous military proceedings, the scientific background of those defenses, and the reception they have received. There are many other challenges to drug testing programs and a wide variety of articles, books and publications on these various issues. This paper does not examine issues about the constitutionality of searches by public employers<sup>12</sup>, nor problems with the imposition of a drug testing program by an employer<sup>13</sup>. Nor does this paper examine an employee's ability to sue an employer for invasion of privacy, wrongful discharge or some other related tort.<sup>14</sup>

## II. Overview of Employee Drug Testing

### A. The Policies of the Employer

As with many issues in the area of labor relations, there is wide variety in the terms of different collective bargaining agreements as related to drug testing. Some of the CBAs are influenced by federal policy and regulations such as the Department of Transportation's rules and regulations on drug testing.<sup>15</sup> Others reflect the concerns of the employer or even the union over the issue of drug use by workers.<sup>16</sup> Many of the programs are not in the formal Collective

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<sup>11</sup> A military member who tests positive for drugs may be court-martialed for a violation of Article 112a, wrongful use of drugs. United States v. Green 55 M.J. 76 (2001).

<sup>12</sup> See, Donald M. Remy, Note, *The Constitutionality of Drug Testing of Employees in Government Regulated "Private" Industries*, 34 HOWARD L. J. 633 (1991)

<sup>13</sup> See Paul Keneally, Note, *Labor Injunctions Pending Arbitration: Should Courts Enjoin Managements' Unilaterally Implemented Drug-Testing Programs?*, 60 FORDHAM L. REV. 1035 (1992).

<sup>14</sup> See Maureen McLeer Morin, Note, *Balancing Public Safety and The Right to Privacy: The New Jersey Supreme Court Affirms Random Drug Testing for Employees Holding Safety Sensitive Positions*, 10 SETON HALL CONST. L. J. 455 (2000). Stephen M. Fogel et. al, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV 553 (1988).

<sup>15</sup> 49 C.F.R. § 40 et seq (2003).

<sup>16</sup> The Washington Metropolitan Area Transit Authority (WMATA or "Metro") wanted to eliminate random drug testing of its elevator and escalator mechanics. One of the unions involved threatened to bring a lawsuit if Metro made the unilateral decision to stop random testing. Lyndsey Layton, *Metro, Union Spar Over Drug Tests*, Washington Post, 23 May 2002 at B1.

Bargaining Agreement but are stated separately. At times, the unilateral imposition of a drug testing program has itself become an issue in arbitration.<sup>17</sup> However all the policies share the same general issues: when to test, who to test, how to test and what to test for.

The employer and the union will have developed a system for the drug testing program. There will be a determination of which employees to test. Employers and unions are both concerned about personnel in safety-sensitive positions. Additionally, federal law may require the drug testing of certain employees in the private sector.<sup>18</sup>

Another issue is when to test. This can be divided into areas of pre-employment testing, probable cause testing, post-accident testing and random testing. Pre-employment testing can save significant money for an employer by preventing the hiring of drug users and discouraging drug users from applying.<sup>19</sup> However because applicants are not employees they can not arbitrate the drug tests.

In "probable cause" testing, the collection of a specimen is based on some observation or report that gives the employer reason to believe that the employee is under the influence of prohibited drugs.<sup>20</sup> The employer and union may set forth specific requirements for 'reasonable suspicion' such as the employer must provide the employee and union with notice of the factual

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<sup>17</sup> Paul Keneally, Note, *Labor Injunctions Pending Arbitration: Should Courts Enjoin Management's Unilaterally Implemented Drug-Testing Programs?* 60 Fordham L. Rev 1035 (1992).

<sup>18</sup> See, Omnibus Transportation Employee Testing Act, Pub. L. No 102-143, 105 Stat. 952 (1991). Pertinent parts of the law are codified with amendments at 49 U.S.C. 5331 (2003) (mass transit), 49 U.S.C. 31306 (2003) (commercial motor vehicles), 49 U.S.C. 31310 (2003) (commercial motor vehicles).

<sup>19</sup> One study examined the history of U.S. Postal employees whose pre-employment drug test results were only known to an investigative team. The study found that employees with positive results on pre-employment tests were 5.69 times more likely to be referred to an Employee Assistance Program and 3.42 times to file medical claims with these claims having a median cost 83% higher. Irving Sunshine, *Mandatory drug testing in the United States*, 63 Forensic Science Intl. 1, 6 (1993)

<sup>20</sup> In 2001, 26.1% of reasonable suspicion tests were positive for drugs or alcohol. *Exclusive SDR Survey: Budget-Friendly Ideas to Discourage Workplace Drug Use*, SECURITY DIRECTOR'S REPORT, Sept 1, 2002 (2002 WL 7389751).



basis including the date, time, place and source of information.<sup>21</sup> When not clearly defined by the parties, arbitrators have varied on what factors will constitute "probable cause."<sup>22</sup> The federal regulations refer to this as 'reasonable suspicion' testing.<sup>23</sup> According to Federal Transit Administration (FTA) guidance, "Reasonable suspicion determinations are made by trained supervisors and must be based on specific, contemporaneous, articulated observations concerning the appearance, behavior, speech, or body odor of the safety-sensitive employee."<sup>24</sup>

Post-accident testing occurs like it says after an accident has occurred. Employers will have different definitions of the type of accident that is required to trigger testing. Employees who were involved in the accident are tested within a short time frame after the incident.<sup>25</sup> For example, when an accident involving death, bodily injury or significant property damage occurs, the FTA requires safety-sensitive employees who were operating the vehicle and other safety-sensitive employees whose performance could have contributed to the accident be tested for drugs within 32 hours.<sup>26</sup>

Random testing is intended to be unannounced and unpredictable.<sup>27</sup> Unlike reasonable suspicion or post-accident testing, the employee has not engaged in any behavior which triggers

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<sup>21</sup> Dep't of Correctional Services v. NYSCOPBA NYS PERB, 116 Lab. Arb. (BNA) 142 (Babiskin, 2001). The employer received information from a confidential informant that he had seen the employee smoke marijuana on numerous occasions. Employer ordered a drug test based on the 'reasonable suspicion' and result was positive for marijuana. Union challenged that information was not sufficient under the contract. Contract also specified that: "vague or unparticularized or unspecified hunches or intuitive feelings are insufficient." Arbitrator upheld employer's discharge finding employer acted in good faith.

<sup>22</sup> See, Southern California Gas Co. v. Utility Workers Union of America, Local 132, 89 Lab. Arb (BNA) 393 (1987) (Alleyne et. al. Arbs.) (anonymous telephone call followed by supervisor's observation that employee was calm and placid, had red eyes in the polluted air of Los Angeles is not sufficient)

<sup>23</sup> 49 U.S.C § 5331 (b) (2003).

<sup>24</sup> FEDERAL TRANSIT ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, FTA DRUG AND ALCOHOL PROGRAM ASSESSMENT AT 6 (2002).

<sup>25</sup> Oddly, in 2001 "post accident drug tests are positive less frequent than random tests." *Are You Spending Too Much on Drug Prevention Efforts?*, SAFETY DIRECTOR'S REPORT, Sept 1, 2002 (2002 WL 7394749)

<sup>26</sup> FEDERAL TRANSIT ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, FTA DRUG AND ALCOHOL PROGRAM ASSESSMENT AT 6 (2002).

<sup>27</sup> In 2001, random testing resulted in 7% positives while periodic scheduled tests resulted in 3.4% positive tests. *Exclusive SDR Survey: Budget-Friendly Ideas to Discourage Workplace Drug Use*, SECURITY DIRECTOR'S REPORT, Sept 1, 2002 (2002 WL 7389751).

the testing. The procedure is to have a certain percentage of testing eligible employees selected for testing over a given period. For example, the Federal Transit Authority requires 50 percent of the eligible employees be tested yearly for drugs.<sup>28</sup> Employees who are tested on a given random day are still eligible to be tested again on the next random day. Random testing does not guarantee that employees who use illegal drugs will be detected, but is thought to discourage them.<sup>29</sup>

## **B. How the Sample is Collected and Tested**

After notification the individual employee reports to an area to provide a sample, usually urine. Urine is the preferred method of testing due to the low cost and the relative ease in collection as compared to blood. At the collection point, methods are used to insure that rudimentary attempts at adulteration are caught. This includes but a bluing agent in the toilet bowl, not having any other source of water in the collection area, and checking the temperature of the sample.

The sample is collected or poured into a sterile bottle that is sealed in the presence of the employee. The employee typically signs a form stating that the bottle was empty before the urine was placed in it and he saw the sample was secured and taped. Safety-sensitive tape is placed over the bottle and lid. The sample is then sent to a drug testing laboratory for analysis. The samples are placed in a box and sent by common carrier with signature requirements for both the sender and the receiver.

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<sup>28</sup> FEDERAL TRANSIT ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, FTA DRUG AND ALCOHOL PROGRAM ASSESSMENT AT 6 (2002).

<sup>29</sup> Jules I. Borack, *A Technique for Estimating the Probability of Detecting a Nongaming Drug User*, 51 THE AMERICAN STATISTICIAN 134 (1997). Analyzing a Navy program that requires testing of 10-30% of its personnel every month. The program has successfully reduced the number testing positive from 7% in 1983 to less than 1% in 1997. Using statistical models under these test scenarios it can take several years to detect a drug user.

Upon arrival at the lab, the box and its contents are examined for damage. If there is damage to the box the lab will not test the samples. The samples are then taken to an area for processing. Each sample is divided into two for 'split-sample' testing. In 'split-sample' testing this aliquot of original urine is maintained, frozen, to allow for another laboratory to test any samples that are recorded as positive. The second laboratory tests will be done upon an employee's request.

The aliquot of the urine is processed through a screening test. The screening test will test for various drugs or their metabolites, a signature chemical that is excreted after ingestion of the drug. Employers testing as part of DOT requirements must test for amphetamines, cocaine and its metabolites (BZE or BE), marijuana's metabolite (THC), opiates and PCP.<sup>30</sup> Employers may also request that the laboratory test for other substances on Schedule I or II of the Controlled Substances Act and ethanol (i.e. alcohol).

The screening test may be one of several different immunoassay methods. Common methods are the RIA<sup>31</sup> or the EMIT<sup>32</sup> test. This test is less expensive than the later confirmatory test. If an aliquot is measured as negative by the screening test it is reported as a negative and the aliquot and original sample are destroyed. Based on different sensitivities of the various tests, the screening test will have a different cut-off level for differentiating between positive and negative tests. The screening tests are less expensive and less reliable than the confirmatory tests with

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<sup>30</sup> This is known as the NIDA 5. NIDA is the National Institute of Drug Abuse.

<sup>31</sup> Radio Immunoassay (RIA)

<sup>32</sup> Enzyme Multiplied Immunoassay Test

more false positives.<sup>33</sup> A sample which is above the cut-off level is reported as “presumptively positive.”<sup>34</sup>

If the aliquot is measured as presumptively positive, then the urine is processed for a confirmatory test. The “gold standard” of confirmatory tests is the GC/MS, gas chromatography/mass spectrometry test, which searches for the “molecular fingerprint” of the specific drugs.<sup>35</sup> This test is much more reliable in determining the actual substance being tested. The GC/MS is also much more expensive than the screening tests.<sup>36</sup> The results from the GC/MS are compared to the cutoff levels. A test that shows activity below the cutoff level is reported as negative and the samples are destroyed. A result that is above the cutoff level is reported as positive. Arbitrators are likely to insist that an employer rely on a GC/MS test result and not some other cheaper and less reliable test.<sup>37</sup>

After the GC/MS positive is reported, the results are sent to a Medical Reviewing Officer (MRO). The MRO reviews the results and compares them to what is known about a person’s medical history. The MRO may call the employee and ask about any drug prescriptions.<sup>38</sup> The MRO determines if the results are due to authorized use of prescription medicines or an illegal prohibited use. The MRO may testify at the arbitration or may prepare an affidavit that is used at the hearing.

The above description describes urine testing as it is the most prevalent form of testing for drugs of abuse. For the federal government and for federally regulated workplaces only urine

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<sup>33</sup> False positive rates for the EMIT test ranges from 2.5% for methadone to 12.5% for amphetamines. Mark L. Waple, *Drug Tests: Issues Raised in the Defense Of a “Positive” Result*, 11 NOVA L. REV. 751, 759 (1987)(citing Morgan, *Problems of Mass Urine Screening for Misused Drugs*, J. Of Psychoactive Drugs, Oct-Dec 1984 at 309.)

<sup>34</sup> Tia S. Denenberg and Richard V. Denenberg, *Drug Testing from the Arbitrator’s Perspective*, 11 NOVA L. REV. 371, 381 (1987).

<sup>35</sup> Id at 381.

<sup>36</sup> Id.

<sup>37</sup> Id.

testing is approved.<sup>39</sup> The Substance Abuse and Mental Health Administration (SAMSHA) refers to urine drug testing as the "Gold Standard" because of its "proven accuracy, reliability, and fairness."<sup>40</sup> "Testing hair specimens is becoming more common in some unregulated, private sector programs. Oral fluids and sweat are also used in some testing programs and non-instrumented, on-site test devices are available for screening of both urine and oral fluids."<sup>41</sup> However these new testing methods have limitations. Hair analysis is a more recent development in criminal cases and employee discipline cases than urine testing.<sup>42</sup> Hair analysis is less able to pinpoint an actual date of ingestion but is better able to show a history of drug use.<sup>43</sup>

### III. Defenses

#### A. Attack the Lab

Some drug testing laboratories provide sufficient ammunition against themselves for an employee to win in arbitration. The problems at the laboratories can run from mundane issues with the maintenance of machines to false credentials of staff. For example, in July 2000 at the Air Force Drug Testing Laboratory, "an internal blind quality control sample that should have been negative erroneously tested positive for the metabolite of cocaine."<sup>44</sup>

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<sup>38</sup> An employee may have a valid prescription for amphetamines. This may not be dispositive on the issue if the employee is required to report the use of such drugs for safety concerns.

<sup>39</sup> <http://workplace.samhsa.gov/DrugTesting/Background.htm> (last viewed April 27, 2003)

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> See, *United States v. Bush*, 47 M.J. 305 (CAAF 1997) (Upholding a conviction for the wrongful use of drugs based on a hair analysis. "This may be the first drug-use conviction by hair analysis...")

<sup>43</sup> M.R. Moeller, et. al. *Hair Analysis As Evidence In Forensic Cases*, 63 FORENSIC SCIENCE INTL. 43 (1993). ("Hair analysis can be used for the determination of drug use months after drug consumption." At 43)

<sup>44</sup> *United States v. Brozzo*, 57 M.J. 564 (A.F. Court of Criminal Appeals 2002)

Southern California Gas Company ran into problems when the clinic it used to review drug tests hired a person who was masquerading as a physician.<sup>45</sup> The employer had adopted as part of its rules the Department of Transportation regulations that require a doctor to review the drug test results. The bogus doctor had reviewed thirteen drug tests and had testified during at least one labor arbitration hearing. It was later discovered that he did not have a medical license and had been imprisoned three separate times related to impersonating a physician.<sup>46</sup> The employer lost a later arbitration and was required to rehire two employees who had tested positive and had their test results reviewed by the bogus physician.<sup>47</sup>

This is not the only case where an arbitrator has ordered reinstatement where there were problems with the drug testing laboratory.<sup>48</sup> United Lab performed the urinalysis testing. The personnel had made several errors in dating of when the specimen was received and when various tests took place. The arbitrator described the errors as 'sloppy procedure' but was not persuaded that the errors were material to the credibility of the findings. However, the "stunning revelation" of the MRO on the witness stand was sufficient to destroy the laboratory's credibility. The MRO testified that although the documents were allegedly signed by him and that the laboratory's senior vice president testified as to speaking to the MRO on the phone, that the MRO had never reviewed the test results prior to be contacted for the hearing.<sup>49</sup> The employer tried to compensate for this by having this MRO review the results and having an independent MRO also review the test. However, the employer incorporated the DOT rules and regulations into its work rules and the arbitrator described that the MRO is an essential lynch-pin. The

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<sup>45</sup> Lorenza Munoz, *Bogus Doctor's Role in Fired Workers' Drug Tests Probed*, Los Angeles Times, June 26, 1996 at B3.

<sup>46</sup> Id. One of the imprisonments was for involuntary manslaughter of a patient who he misdiagnosed.

<sup>47</sup> Southern California Gas Co. v. Utility Workers Union of America, Local 132, 265 F.3d 787 (9<sup>th</sup> Cir. 2001)

<sup>48</sup> Schwebel Baking Co. v. Teamsters, Local 377, 1997 WL 753734 (Arb.) (Ruben, Arb.)

<sup>49</sup> The MRO had resigned his position with the lab the day before the arbitration hearing

arbitrator noted that the employer had even described the MRO as critical to the case prior to its discovery of his lack of involvement in the case. The Arbitrator "reluctantly, in realization that the Company was entirely without fault in the matter, and had reasonably relied upon United Labs" ordered the reinstatement of the employee without loss of seniority and backpay.<sup>50</sup>

The Air Force Drug Testing Lab (AF DTL) similarly ran into issues with one of its employees. The chief of the confirmations branch was found to have "manipulated the record of testing on 15 drug runs."<sup>51</sup> His actions were described as an intentional act of fraud.<sup>52</sup> The Air Force later fired this individual and conducted an internal audit to determine if other fraud had occurred.<sup>53</sup>

## **B. Second Hand Smoke:**

### **1. Passive Inhalation**

In situations where the urinalysis involves evidence of THC, the metabolite for marijuana, the employee can claim that the positive result is due to exposure to second hand smoke. A number of employees have relied on their off duty exposure, often inadvertent, to others smoking marijuana to explain their positive results. Understandably, this defense is only used during random or periodic testing and is not commonly used during probable cause testing.

One of the leading studies on this subject was reported in the Journal of American Medical Association in 1983.<sup>54</sup> In this study four experienced marijuana users smoked marijuana cigarettes in the presence of nonsmokers in the setting of a small closed room and in a medium-

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<sup>50</sup> The grievant was discharge on May 26, 1996 and the arbitration award was issued on April 2, 1997. The award of backpay included overtime but "subject to all appropriate deductions, off-sets and credits, including unemployment benefits received, or compensation earned..."

<sup>51</sup> United States v. Pugh, 2002 CCA Lexis 103 (Air Force Court of Criminal Appeals, 2002)

<sup>52</sup> Id.

<sup>53</sup> Id. The audit covered 4 months of urinalysis testing and did not reveal any additional problems.

sized station wagon.<sup>55</sup> The three experiments used 2 marijuana cigarettes smoked simultaneously in a small room, four marijuana cigarettes smoked simultaneously in the car, and two marijuana cigarettes smoked simultaneously in the small room for three consecutive days.<sup>56</sup> Over 80 urine samples were obtained from the subjects. Only two barely exceeded the 20 ng/ml cutoff level on the EMIT screening assay, and none exceeded or even came close to the standard 50 ng/ml cutoff. The researchers concluded that "allegations that urine samples that contain more than 50 ng/ml of cannabinoids by the EMIT are the result of passive inhalation of marijuana are untenable or, at best, highly questionable."<sup>57</sup> The researchers also questioned whether the concentrations found in this study would even be reproduced in real life when marijuana cigarettes are smoked sequentially and in better ventilated environments.<sup>58</sup>

A similar study subjected the volunteers to marijuana smoke of 4 or 16 marijuana cigarettes for 1 hour each day for 6 consecutive days.<sup>59</sup> The setting was a small ventless room. All of the subjects subjected to the 16 cigarette level showed significant amounts of the marijuana metabolites in their urine samples. The researchers concluded: "It seems improbable that subjects would unknowingly tolerate the noxious smoke conditions produced by this exposure."<sup>60</sup> At the lower 4 marijuana cigarette level the urine samples were positive infrequently. As both studies indicate passive inhalation of marijuana smoke can cause positive urinalysis results above the threshold limits. However the experimental conditions that cause a

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<sup>54</sup> Mario Perez-Reyes, et. al. *Passive Inhalation of Marijuana Smoke and the Urinary Excretion of Cannabinoids*, 249 JAMA 475 (1983).

<sup>55</sup> Id. (The room was 8x8x10 ft.)

<sup>56</sup> Id. (The smoking was done in a manner to maximize the amount of smoke in the settings.)

<sup>57</sup> Id at 475.

<sup>58</sup> Id.

<sup>59</sup> E.J. Cone et. al. *Passive Inhalation of Marijuana Smoke: Urinalysis and Room Air Levels of Delta-9-Tetrahydrocannabinol*, 11 J. OF ANALYTICAL TOXICOLOGY 89 (1987)

<sup>60</sup> Id. at 89.



positive result, lots of marijuana smoke in a small confined space, are unlikely to occur to employees unknowingly.<sup>61</sup>

Employees have not had wide success in labor arbitration cases when using this defense.<sup>62</sup> Arbitrators have looked at the urinalysis results in finding that an employee's claim of passive inhalation was not credible.<sup>63</sup> Arbitrators also are bound by the language of the CBA that may make a claim of passive inhalation pointless. For example Penzoil-Quaker State had a CBA that provided that "being under the influence of prohibited drugs while on the job or on Company property" was cause for termination.<sup>64</sup> The contract further defined "being under the influence" as "the presence of alcohol or drugs in a person's system at a level prohibited by the Company."<sup>65</sup> The initial training also informed employees that a positive result, even from passive inhalation, would result in termination. During a random urinalysis an employee tested positive for marijuana, one of the prohibited drugs.<sup>66</sup> The employee claimed that the result was due to passive inhalation. The arbitrator agreed with the Company's argument that the contract made no distinction between intentionally smoking marijuana and passive inhalation at sufficient levels to cause a positive result and either was a cause for termination.<sup>67</sup>

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<sup>61</sup> J. W. Hayden, *Passive Inhalation of Marijuana Smoke: A Critical Review* 3 J. OF SUBSTANCE ABUSE 85 (1991).

<sup>62</sup> See, *Mason & Hangar-Silas Mason Co., Inc. v. Metal Trades Council of Amarillo, Texas* 103 Lab. Arb. (BNA) 371 (1994) (Cipolla, Arb.) (rejecting claim that test result of 49 ng/ml was due to attendance at country western concert week before where grievant could not smell marijuana due to congestion but wife did); *USS v. United Steelworkers of America, Local Union No. 1557*, 1995 WL 86235 (Arb.) (Dybeck, Arb.) (rejecting claim of passive inhalation where test results were 54 ng/ml); *Willert Home Products, Inc. v. Int'l Chemical Workers Union Local 432*, 1994 WL 851232 (Arb.) (Fowler, Arb.); *Alcan Aluminum Co.*, 88 Lab. Arb (BNA) 386 (1986) (Arb, Kindig) (rejecting claim based on exposure to smoke at a barbecue three days prior to the test)

<sup>63</sup> *Frito-Lay Inc.* 109 Lab. Arb (BNA) 850 (H, 1997)

<sup>64</sup> *Int'l Brotherhood of Teamsters, Local Union No. 273 v. Penzoil-Quaker State*, 1999 WL 1331151 (Arb.) (Neigh, Arb.)

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (GC/MS result was 38.5 ng/ml over the 15 ng/ml cut-off level).

<sup>67</sup> *Id.* (Based on the multiple inconsistencies in the employee's story and the scientific evidence, the arbitrator concluded "that the positive test result was not caused by passive exposure to second-hand marijuana smoke, and even if it had been, that would not excuse the Grievant's being under the influence of marijuana while on the job.")

A grievant who was the victim of forced passive inhalation partially convinced an arbitrator.<sup>68</sup> The grievant went hunting with three other employees on a Saturday. The day was rainy so they mostly drove around in a small car unsuccessfully looking for deer and drinking. The other three employees smoked marijuana throughout the day,<sup>69</sup> the grievant complained about smoke and tried to keep the windows open but it was too cold and wet. The grievant was selected for a random urinalysis on Monday and tested at 31 ng/ml over the 15 ng/ml cutoff level. The arbitrator did not believe the claim of passive inhalation given the testimony of the manager of the testing laboratory and statements about medical evidence in the federal registry. However at the hearing, one of the co-workers said that the employees blew concentrated marijuana smoke into the grievant several times while he was 'passed out drunk.'<sup>70</sup> Another of the sequestered employees confirmed this account. The arbitrator deferred judgment and ordered reinstatement if a medical reviewing officer (MRO) could verify that this process could cause the positive result. Unfortunately, there is no indication as to what information the MRO later provided.

However a well developed defense in conjunction with a low result and a good work record can have positive results for an employee. For example, Arbitrator Brodsky adjudged a case involving a worker who had a urinalysis result of 18 ng/ml of THC when the cutoff level was 15 ng/ml.<sup>71</sup> The arbitrator found the employee credible when he claimed he was exposed to second hand smoke while in a car. In support of this claim, the defense submitted 'several

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<sup>68</sup> Appalachian Power Company v. United Mine Workers of America, 1997 WL 1068767(Arb.) (Hewitt, Arb.)

<sup>69</sup> Id. There is no indication that the other employees were disciplined for their admitted marijuana use.

<sup>70</sup> Id. The arbitrator described this as 'surprise testimony to all.' The employees described the process as 'blowing him shotguns.' "Blowing shotguns is described as putting a lighted marijuana cigarette in one's mouth backwards, coupling the hands around the smoker and the other person, and blowing the smoke directly into the other person's nose and mouth. The witness convincingly described the reaction of the passed out grievant as he slapped his face, coughed, and otherwise reacted in his unconscious state...."

<sup>71</sup> MI AFSCME Council 25, Local 129 v. Michigan Dep't of Community Health (Hawthorn Center), 2002 WL 31993506 (Arb) (Brodsky, Arb.)

articles and copies of on-line references'.<sup>72</sup> The arbitrator discounted the Medical Reviewing Official's dismissal of the claim. She noted that the employee is simply a number to the MRO because the MRO is "unfamiliar with the individual being tested, has no notion of their reputation, their disciplinary record or their past medical history."<sup>73</sup> Arbitrator Brodsky found discipline was appropriate because the rules prohibited employees from testing positive for drugs but decided discharge was not appropriate.<sup>74</sup>

Two documents are listed by the arbitrator on the issue of second hand smoke. One of the documents is from Columbia University's Health Service question and answer website.<sup>75</sup> The question on the website was from a military member who was concerned about whether exposure to second-hand marijuana smoke would cause a positive result on a urine test. The answer was: "Second-hand marijuana smoke -- buzz producing, or not -- can show up on urine tests, but it will only produce a positive result in the first day or so after breathing in the smoke. And, by the way, that smoke would have to be so thick that it would irritate the eyes of both smokers and passive smoke breathers."<sup>76</sup>

The second document was a story from the San Jose Mercury News about a claim by NFL-player Darrell Russell that a positive result on his urinalysis test was due to second hand smoke.<sup>77</sup> The article quotes a professor of medicine from the University of California at San Francisco as saying that it is possible for an individual to test positive based on exposure to second hand smoke. However the expert continues to say that although this defense is

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<sup>72</sup> Id. The two cites listed in the footnotes are to Columbia University's Health Question and Answer Internet Service and an article in the San Jose Mercury news.

<sup>73</sup> Id.

<sup>74</sup> Id. The award was for an unpaid suspension, with 1 day converted to 'active pay status' so the employee would be eligible for early retirement. The employee was required to apply for early retirement.

<sup>75</sup> <http://www.goaskalice.columbia.edu/1289.html> (last checked 26 April 2003)

<sup>76</sup> Id. The answer also discusses the reliability problems and the potential racial bias in hair testing.

<sup>77</sup> *Could Second-Hand Smoke Cause Positive Drug Test?; Experts Say It's Possible But Unlikely*, SAN JOSE MERCURY NEWS, August 8, 2001 at D4.

"commonly claimed...it's not common" explaining that a positive result requires "intensive exposure... in a room or a car with a lot of smoke" and that most tests are set with a cutoff level to prevent positive results in such circumstances. The arbitrator may have been influenced by the mention that the NFL cutoff level was 15 ng/ml while the Department of Transportation cutoff level was 50 ng/ml. The article also mentions Canadian Olympic snowboarder Ross Rebagliati who successfully defended against a positive drug test by contending it was due to second hand exposure at a wake he attended where the other mourners "smoked marijuana by the bale."<sup>78</sup>

The arbitration discussed above shows why good medical research is necessary for both parties. The professor in the newspaper article impliedly refers to the JAMA study discussed above. This study shows that even with a cutoff level of 15 ng/ml with the GC/MS that a positive result will not occur. Additionally, the study's methodology shows that casual exposure at a concert or other large venue will not be sufficient to cause positive results. The actual medical study could be used by the employer to refute the employee's defense and should be reviewed by the union to see if it can support the employee's story. Beyond medical research the union took a risky position by referencing Mr. Darrell Russell as an example of a person with a false positive result. He later was suspended for 4 games for missing a mandatory drug test, suspended for a year after tested positive for the illegal drug Ecstasy<sup>79</sup>, and was arrested for drugging and raping a woman.<sup>80</sup> Mr. Russell's unsuccessful defense to the positive urinalysis for

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<sup>78</sup> Id. He had his gold medal restored to him.

<sup>79</sup> The street name for MDMA. Ecstasy is "known as the "hug drug" or "feel good" drug, it reduces inhibitions and produces heightened sensuality, the elimination of anxiety, and extreme relaxation. Ecstasy users experience both hallucinogenic and stimulant effects that last several hours." U.S. DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, ECSTASY AND OTHER PREDATORY DRUGS, 6 (2003).

<sup>80</sup> Ron Kroichick, *A Raider's Fall From Grace*, S.F. CHRONICLE, March 4, 2002 at A1.

Ecstasy was that unknown to him at the time a friend has spiked his drink with the drug.<sup>81</sup> This innocent ingestion defense is discussed later.

An extensive use of medical research can benefit the employee. Arbitrator Bankston reinstated an employee who tested positive for marijuana at 71.197 ng/ml on the GC/MS.<sup>82</sup> The employee claimed that the results were due to passive inhalation of marijuana smoke by his roommate who was HIV positive and smoked significant amounts of marijuana on a regular basis to overcome the nausea and to aid weight gain. The roommate's use of marijuana was substantiated by a letter from an HIV project coordinator. The union submitted various medical journal articles, including those listed above, to prove that prolonged passive inhalation of marijuana could cause a positive result. The arbitrator concluded that there was not just cause to support a termination and reduced the action to a 30 day disciplinary suspension.

## **2. External Contamination of Hair**

Similar to the defense of passive inhalation is the defense of external environmental contamination of hair. Hair is thought to incorporate drugs through the blood stream, sweat, oil and other external environmental sources.<sup>83</sup> Several factors cause different drugs to incorporate into the hair at different rates.<sup>84</sup> Hair may be more prone to environmental contamination due to its high surface to volume ratio.<sup>85</sup> The concern is that a nonuser who is present in a drug environment may test positive due to the hair's incorporation of the drug through different processes.

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<sup>81</sup> Id.

<sup>82</sup> *Kerrville Bus. Co., Inc. v. Int'l Brotherhood of Teamsters, Local No. 1110*, 1995 WL 59451 (Arb.) (Bankston, Arb.)

<sup>83</sup> R. Wenning, *Potential Problems With The Interpretation Of Hair Analysis Results*, 107 FORENSIC SCIENCE INTL. 5 (2000).

<sup>84</sup> R. Wenning at 8. (The factors related to the drug are its melanin affinity, lipophilicity (attraction to the lipids in hair), and is pH level.)

One study found that hair soaked in a sweat-like solution that contained cocaine caused the hair to test positive even after the hair was cleaned in the laboratory.<sup>86</sup> The researchers were concerned that if sweat became contaminated then it could also cause the hair to become contaminated. A study of children living in cocaine contaminated environments found that their hair tested positive for cocaine.<sup>87</sup> One of the theories for this result was that the hair absorbed the cocaine through external environmental factors.<sup>88</sup> The amount of drugs in the hair paralleled the drug use by the parents.

The drug testing industry has tried to overcome the problem of external environmental contamination by different washing methods. However none of the washes have been able to remove all of the drug due to external contamination.<sup>89</sup> Another proposed method is setting a cut-off level that distinguishes between use and external environmental contamination. A study found that external contamination by a dry rub of a small amount of cocaine caused detectable amounts of the drug to be incorporated in the hair.<sup>90</sup> The study found that all the proposed washing methods failed to remove the drug to below a detectable limit one day after contamination. The samples also tested positive above proposed cut off levels and thus reflected that hair came from users.<sup>91</sup> The researchers determined that "the result from the hair test should always be confirmed with a urine test."<sup>92</sup>

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<sup>85</sup> R. Wenning at 10.

<sup>86</sup> David L. Blank & David A. Kidwell, *External Contamination of Hair by Cocaine: An Issue in Forensic Interpretation*, 63 FORENSIC SCIENCE INTL. 145 (1993).

<sup>87</sup> David A. Kidwell, et. al., *Evidence for Bias in Hair Testing and Procedures to Correct Bias*, 107 FORENSIC SCIENCE INTL. 39 (2000)

<sup>88</sup> The other theory is that the children were 'microingesting' the cocaine. However the microingestion theory was inconsistent with urinalysis results and amount of drugs in the hair.

<sup>89</sup> Guido Romano, et. al. *Hair Testing for Drugs of Abuse: Evaluation of External Cocaine Contamination and Risk of False Positives*, 123 FORENSIC SCIENCE INTL. 119 (2001)

<sup>90</sup> The study used 10 mg of powdered cocaine hydrochloride to the hands of the subjects and then the subjects 'contaminated their hair with their hands, as uniformly as possible, from the roots to the ends.' Id. at 120.

### C. Innocent Ingestion of an Illegal Substance

Another possible defense is one of "innocent ingestion." Basically, the innocent ingestion defense is that the employee was ingesting a substance that he believed to be legal and unbeknownst to him at the time, it also contained the illegal substance. The common examples of this are 'marijuana brownies' or 'marijuana spaghetti sauce.' The defense is also raised in the issue of drinks being spiked with a drug. Although a scientifically sound defense, it has not been met with much approval by arbitrators.

Researchers have determined that the ingestion of marijuana mixed in brownies will cause a person to later test positive for the marijuana metabolites.<sup>93</sup> The researchers mixed marijuana with Duncan Hines brownie mix and otherwise prepared the brownies' according to the box's instructions. Five drug free males ingested either two marijuana brownies, one marijuana brownie and a placebo or two placebo brownies. Each marijuana brownie was designed to have the equivalent amount of marijuana as one 'standard marijuana cigarette.'<sup>94</sup> The subjects who ingested either one or two marijuana brownies experienced measurable physiological effects but the onset of the effects was 'slow and variable.'<sup>95</sup> The subjects all had urinalysis results that were above the cutoff level for both the EMIT screening assay and the confirmatory GC/MS. The highest peak concentration for one subject was 436 ng/ml and it occurred 14 hours after ingestion. For both the single ingestion and the double ingestion, the average time until the last positive confirmatory result was about 150 hours.<sup>96</sup>

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<sup>91</sup> All the subjects were drug free and were required to provide urine samples to prove their continued nonuse.

<sup>92</sup> Id at 127.

<sup>93</sup> Edward J. Cone et. al., *Marijuana-Laced Brownies: Behavioral Effects, Physiological Effects, and Urinalysis in Humans Following Ingestion*, 12 J. OF ANALYTICAL TOXICOLOGY 169 (July/August 1988)

<sup>94</sup> According to the study parameters, one standard marijuana cigarette is 800 mg with 2.8% THC.

<sup>95</sup> Id. The peak effects occurred 1.5 hours to 3.5 hours after ingestion as compared to smoking marijuana which causes peak effects minutes after ingestion.

<sup>96</sup> Id. The mean time for single ingestion was 149 hours  $\pm$  36.2 SE and was 156.3 hours  $\pm$  49 for double ingestion. The cut-off level for the confirmatory GC/MS was 5 ng/ml.

The issue of spiked drinks is not one simply concocted by a creative attorney. The Drug Enforcement Agency has briefed Congress about the “untold numbers of unsuspecting young women are being victimized and abused by criminals who spike their drinks with Rohypnol.”<sup>97</sup> The issue has become enough of a concern that some college area police stations distribute coasters that can detect the most common drugs used in spiking drinks.<sup>98</sup> While certain drugs may be used more often to spike drinks, certainly any number of powder or liquid drugs can be added to a drink without a person’s awareness.

Researchers have studied the effects of adding cocaine to a Coca-Cola soft drink.<sup>99</sup> In the study 25 mg of cocaine was dissolved in a 6 oz caffeine free Coca-cola soft drink. The subject reported no unusual taste and only a slight numbing effect on the lips and tongue. The GC/MS test result of the urinalysis showed a peak concentration of 7940 ng/ml of Benzoylcegonine 24 hours after ingestion and a peak concentration of 269 ng/ml of cocaine 1 hour after ingestion. The study concluded “that small oral doses of cocaine, potentially undetectable to the user, may cause positive urine test results for at least 48h, using routine laboratory methods.”<sup>100</sup>

Another potential source of accidental exposure to illegal substances is United States paper currency.<sup>101</sup> “Several studies have reported the detection of cocaine in the US money supply.”<sup>102</sup> US currency has also been shown to have trace amounts of heroin, PCP,

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<sup>97</sup> DEACongressional Testimony of Mr. Terrence W. Woodworth, Deputy Director, Office of Diversion Control, DEA, *Abuse and Trafficking of Rohypnol*, July 16, 1996. (<http://www.usdoj.gov/dea/pubs/cngtest/ct960516.htm>) The effects of rohypnol are similar to alcohol intoxication and include increased sedative effects and memory loss.

<sup>98</sup> Maria Coleman, *Coaster Reveals Date-Rape Drugs*, Daily Titan – Univ. of California Fullerton (Univ. Wire) March 27, 2003.

<sup>99</sup> R.C. Baselt and R. Chang, *Urinary Excretion of Cocaine and Benzoylcegonine Following Oral Ingestion in a Single Subject*, 11 J. of Analytical Toxicology 81 (March/April 1987)

<sup>100</sup> Id. at 82.

<sup>101</sup> Amanda J. Jenkins, *Drug Contamination of US Paper Currency*, 121 FORENSIC SCI. INTL. 189 (2001).

<sup>102</sup> Id. Referencing S. Karch (ed.) *Tainted Money Supply* 9 FORENSIC DRUG ABUSE ADVISOR 20 (1997) & J. Oyler et al. *Cocaine Contamination of United States Paper Currency*, 20 J. Anal. Toxicology 213 (1996).



methamphetamine, morphine and amphetamine.<sup>103</sup> So far only one study has been conducted on whether the drug contamination of currency can cause positive results in a urinalysis.<sup>104</sup> The study involved currency that was immersed in coca paste, then shaken off and given to an individual to handle several times throughout the day without washing his hands. Urine test results did show detectable levels of the cocaine metabolite BE but well below the standard cutoff level.<sup>105</sup> Based on this research it is unlikely that the handling of dollar bills would be sufficient to cause positive results. However it does show that the secondary ingestion of trace amounts from other surfaces can lead to detectable amounts.<sup>106</sup>

Another study was conducted on the dermal absorption of cocaine.<sup>107</sup> In the study a 5-mg dose of cocaine was applied to the forearm of a cocaine free subject. Urinalysis samples were taken from the subject up to 96 hours after the administration of the drug. The researches found that although detectable by the RIA immunoassay screening test all the results were below the 300 ng/ml threshold level. The GC/MS testing did not detect any cocaine but did detect benzoylecgonine, a cocaine metabolite. The highest concentration of benzoylecgonine was 55 ng/ml on the GC/MS. The researchers concluded; "These findings underscore the need to use caution when interpreting low-level urine drug-testing results, especially when those results fall below the commonly accepted immunoassay and GC/MS thresholds for benzoylecgonine of 300 and 150 ng/ml respectively."<sup>108</sup>

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<sup>103</sup> Id. The study collected one dollar bills in general circulation in Baltimore, Chicago, Denver, Honolulu and San Juan.

<sup>104</sup> Id. (citing M.A. ElSohly, *Urinalysis and Casual Handling of Marijuana and Cocaine*, 15 J. OF ANAL. TOXICOLOGY 46 (1991).

<sup>105</sup> The highest result was 72 ng/ml with the cutoff usually being 300 ng/ml.

<sup>106</sup> See, *United States v. George*, 40 M.J. 540, 542 (C.M.R. 1994) (defense expert in forensic toxicology testified that result of 193 ng/ml in urinalysis could be produced by ingestion of as little as 12 micrograms of cocaine which is 'an infinitesimal amount that an individual chemist could not really weigh out in a laboratory. It's like a particle of dust.')

<sup>107</sup> R.C. Baselt et. al., *On the Dermal Absorption of Cocaine*, 14 J. OF ANALYTICAL TOXICOLOGY 383 (1990).

<sup>108</sup> Id. at 384.

One employee unsuccessfully argued that his positive result was due to the dermal absorption of cocaine.<sup>109</sup> The employee tested positive for cocaine on a urinalysis conducted on January 31, 1994. The employee claimed that he attended a sports bar the day before on Super Bowl Sunday and that cocaine was present at the bar. He stated he only had a few Miller beers and that neither her nor his friends were using cocaine. He stated that he was not aware of any cocaine on his skin at the time. The employee submitted to the arbitrator the above mentioned article on dermal absorption. The arbitrator denied the grievance. The arbitrator found that the employee was not credible.<sup>110</sup> The arbitrator discounted the possibility of dermal absorption given that the employee testified he did not come into any contact with cocaine.

Presumably, any employee who dines or imbibes at a location where drugs are present may unknowingly ingest trace amounts sufficient to cause a positive result. Studies have shown that children who live in a drug contaminated environment test positive and the theory is that this is due to 'microingestion' of the drugs.<sup>111</sup> The difficulty for the employee who tests positive in this scenario would be proving that the results were not due to intentional ingestion. The more likely the event would lead to accidental secondary ingestion, the more the employee's attendance at the event would indicate intentional use. The defense of: "I was at a drug bar and must have unknowingly ingested some trace amounts" is not likely to be a strong defense.

A problem in many of the innocent ingestion scenarios is the credibility problems of the employee or the other witnesses.<sup>112</sup> This may be because credible and believable employees have

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<sup>109</sup> Chicago Transit Authority v. Local 308, Amalgamated Transit Union, 1995 WL 869769 (Arb.) (Wolff, Arb.)

<sup>110</sup> The grievant also had a history of disciplinary violations. He alternatively claimed that the nurse at the testing facility contaminated his sample and that the employee tested immediately before him was a known drug user, even though he did not know the other employee's name.

<sup>111</sup> David A. Kidwell, et al. *Evidence For Bias In Hair Testing And Procedures To Correct Bias*, 107 FORENSIC SCIENCE INTL. 39, 46 (2000) (summarizing other studies)

<sup>112</sup> Tia Schneider Denenberg & R.V. Denenberg, Alcohol and Other Drugs: Issues in Arbitration 226 (1991) In cases involving the unintentional ingestion of drug laden foods, "the credibility of the grievant, rather than technical considerations, appears to be the decisive factor."

their cases settled in the grievance process prior to arbitration. Arbitrator Hockenberry did not believe an employee's claim that he had unknowingly ingested marijuana in spaghetti sauce while at a friend's house to watch a football game.<sup>113</sup> The arbitrator stated that "although unwitting consumption of marijuana is plausible, it is not persuasively supported by the record."<sup>114</sup> The arbitrator discounted an unsworn letter from the employee's friends when it did not provide their last names, was self-contradictory and was "sufficiently convenient."<sup>115</sup> Although the arbitrator found that the employee had violated the employer's policy on drug use, he determined that the employer had shown just cause for discipline but not for dismissal.<sup>116</sup>

Other employees have had similar results even when the arbitrator believes the innocent ingestion. An employee who accidentally ingested his wife's prescription tranquilizer was reinstated without backpay.<sup>117</sup> The grievant's had prescription medicine for arthritis and high blood pressure. His wife was prescribed a generic form of valium a few weeks before the test. The arbitrator examined all the pills and found that the bottles and pills that both husband and wife were using "were nearly identical in form, size and color."<sup>118</sup> Pursuant to a random drug test, the grievant tested positive for benzodiazepines. The grievant testified that he had accidentally taken two of his wife's pills when he awoke in the middle of the night in their poorly lit mobile home. Arbitrator Allen determined that the grievant's explanation was believable and supported

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<sup>113</sup> Montgomery County Gov't, MD v. Montgomery County Gov't Employees Org., Local 1994, 109 Lab. Arb. (BNA) 513 (1997) (Hockenberry, Arb.)

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id. The arbitrator granted the award of reinstatement without backpay and a last chance agreement.

<sup>117</sup> Bruce Hardwood Floors, Center, TX v. Southern Council of Industrial Workers, Local 2713, 108 Lab. Arb. (BNA) 115 (1997) (Allen, Jr., Arb.)

<sup>118</sup> Id.

by the evidence. Even though the arbitrator determined the ingestion was innocent,<sup>119</sup> he ordered reinstatement without backpay as the employee was still responsible for his mistake.<sup>120</sup>

#### **D. Ingestion of a Legal Substance that Produces the Same Metabolite**

This defense is that the employee ingested a legal substance that produces the same metabolite for as ingestion of a prohibited illegal substance. For example an employee who is legally prescribed Marinol will test positive for the same metabolites as someone who has ingested marijuana.<sup>121</sup> The FDA approved uses of Marinol are for the treatment of anorexia in patients with AIDS and the treatment of nausea in patients who are undergoing chemotherapy. It is unlikely that a person who has a legal prescription who tests positive will appear at arbitration. The MRO would be able to determine that the person has a legitimate reason for testing positive for the substance and should report the test as negative.<sup>122</sup> Of course, an employee may be reluctant to reveal this information to his employer or to the MRO since the prescription will reveal information regarding the underlying medical problem.<sup>123</sup>

The situation that may arise in arbitration is when an employee has ingested a substance that is legal, does not require a prescription, and would cause the same test result. Medical literature provides two examples of when this may occur: the now banned Health Inca Tea and

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<sup>119</sup> Id. "...D is 'innocent' in the sense that he truly took his wife's medication by accident."

<sup>120</sup> The arbitrator also allowed the company to conduct increased drug testing of the employee and to place him in a less safety sensitive job for a year.

<sup>121</sup> "MARINOL contains man-made dronabinol (THC). Dronabinol also occurs naturally, and has been extracted from *Cannabis sativa L.* (marijuana)." Marinol (Dronabinol) Capsules Prescribing Information, January 2001. Available at [www.marinol.com/patient/pat02.html](http://www.marinol.com/patient/pat02.html) (last checked 23 Mar 03).

<sup>122</sup> See, 49 C.F.R. § 40.137(d) (2003) However, under Department of Transportation rules, a MRO can not accept a physician's recommendation that an employee use marijuana under a state's medical marijuana law as a reason to record the test as a negative. 49 C.F.R. § 40.151 (2003)

<sup>123</sup> See, *Mares v. ConAgra Poultry Co. Inc.*, 971 F.2d 492 (10<sup>th</sup> Cir 1992) (employee refused to provide employer with list of all prescription drugs she was taking which employer mandated as part of its drug testing program.)

hemp oil. In both cases, legal products were ingested by people who later tested positive for the consumption of illegal drugs.<sup>124</sup>

“Health Inca Tea” was a health drink which was imported from South America. The fact it contained cocaine was first discovered in the military when personnel started to test positive.<sup>125</sup> The tea was made from ‘decocanized coca leaves’.<sup>126</sup> Unfortunately, the process did not remove all of the cocaine. After a 1986 report in the Journal of the American Medical Association confirmed that the drink contained cocaine the DEA seized shipment in Hawaii, Illinois, Georgia and other East Coast states. As late as 1992, the DEA had discovered another shipment under a different name in Baltimore. Further research showed that the ingestion of a single cup of the tea could result in positive drug test results for cocaine metabolites.<sup>127</sup> Not only was the result a positive but the levels were several times the DOT cutoffs with a peak result of 4979 ng/ml.<sup>128</sup> At the time the researchers warned that the use of Health Inca Tea should be considered when evaluating urinary test results positive for benzoylecgonine, the metabolite for cocaine. One employee tried to use ingestion as Health Inca Tea as a defense but was ultimately unsuccessful at the arbitration.<sup>129</sup>

More recently, the use of ‘hemp oil’ products has been used as a defense in drug testing cases showing the metabolites for marijuana. The use, importation and manufacturing of hemp

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<sup>124</sup> Under Department of Transportation rules, a MRO can not accept the consumption of a hemp product or coca teas as a reason to reporting the test as negative. 49 C.F.R. 151(f) (2003). Therefore an employee who makes this claim to the MRO will still have their test reported as positive to the employer.

<sup>125</sup> Federal Drug Administration Import Alert (IA) #31-05 Revised 10/2/92, “Herbal Teas Containing Cocaine”

<sup>126</sup> Id.

<sup>127</sup> A.J. Jenkins, et. al., *Identification and Quantitation of Alkaloids in Coca Tea*, 77 FORENSIC SCI. INT. 179, Feb 9, 1996

<sup>128</sup> Id. See also, G.F. Jackson, J.J. Saady and A. Polkis, *Urinary excretion of benzoylecgonine following ingestion of Health Inca Tea*, 49 Forensic Sci Int 57, Jan-Feb 1991.

<sup>129</sup> TIA SCHNEIDER DENENBERG & R.V. DENENBERG, ALCOHOL AND OTHER DRUGS: ISSUES IN ARBITRATION 224 (1991). (citing an unpublished decision where the arbitrator ultimately decided against the grievant due to credibility issues as the grievant had previously claimed passive exposure for one of two previous positive tests for marijuana).

byproducts is not illegal in the United States.<sup>130</sup> Some nutritional supplements on the commercial market contain hemp seeds or hemp oil.<sup>131</sup> After a series of acquittals in Air Force courts-martial, the Air Force prohibited the use of hemp seed products for its members.<sup>132</sup> A Border Patrol agent contested his discharge for a positive test result by claiming it was the result of his ingestion of fitness bars that contained hemp oil and seeds.<sup>133</sup>

Initial scientific opinion was that marijuana had to be heated in some form, usually smoking or baking, in order to cause the release of THC and a positive urinalysis.<sup>134</sup> However, scientific research had shown that the use of cold-pressed hemp seed oil products could cause a positive test result in urinalysis for THC which was indistinguishable from positive results due to the smoking of marijuana.<sup>135</sup> THC is the short hand for Delta-9 tetrahydrocannabinol which is the metabolite that is tested for in drug tests. The peak level was 68 ng/ml of THC on the confirmatory GC/MS. The results showed that the ingestion of hemp seed oil in a manner consistent with the recommended dosage would result in a positive result on standard workplace drug testing programs.<sup>136</sup> Another researcher found that people who ingested hemp salad oil had positive urinalysis test results for THC.<sup>137</sup> However, a later study was conducted using hemp oil

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<sup>130</sup> Sean McKenna, Capt. *Buyer Beware: Steroids, Hemp Seed Products off-limits to Air Force Members* Air Force News Archive 17 April 2001.

<sup>131</sup> Id.

<sup>132</sup> Air Force Instruction, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*.

<sup>133</sup> Frank Green, *Fired Border Patrol Agent Blames Hemp Bar: Man Says Snack Caused a Positive Result on Drug Test*, SAN DIEGO UNION TRIBUNE, Oct. 13, 2002 At B3.

<sup>134</sup> See, Edward J. Cone et. al., *Marijuana-Laced Brownies: Behavioral Effects, Physiological Effects, and Urinalysis in Humans Following Ingestion*, 12 J. of Analytical Toxicology 169 (July/August 1988) (describing conversion of the THC precursors to THC during smoking and inferring similar process during baking process)

<sup>135</sup> J.C. Callaway, et al. *A Positive THC Urinalysis from Hemp (Cannabis) Seed Oil*, 21 JOURNAL OF ANALYTICAL TOXICOLOGY 319 (1997).

<sup>136</sup> The study used standard workplace drug testing program cut off levels of 50 ng/ml on the initial screen and 15 ng/ml on the confirmatory test.

<sup>137</sup> T. Lehman et. al, *Excretion of Cannabinoids in Urine After Ingestion of Cannabis Seed Oil*, 21 J. OF ANALYTICAL TOXICOLOGY ( Sept. 1997).

made from the current methods of cleaning the hemp seeds prior to the extraction of the oil.<sup>138</sup>

The consumption of this lower THC oil resulted in little or no positive screening for THC in urine.<sup>139</sup>

Hemp seed oil is not the consumable hemp product. The hemp food industry was \$6 million dollars in retail sales in 2002.<sup>140</sup> Hemp products are used increasingly in a variety of natural food products to include tortilla chips, pretzels, nutrition bars, granola, breads and cereals.<sup>141</sup> Hemp food products are not sold only in small co-op groceries but have also been available in nationwide chains such as Whole Foods.<sup>142</sup> French Meadow Bakery in Minneapolis makes "Health Hemp Sprouted Bread" which contains hemp seeds and is distributed across the country.<sup>143</sup> However, the ingestion of the hemp seed bread may not result in a positive test result because the bakers test the both seeds and the bread with results that are virtually THC-free.<sup>144</sup>

The explanation of hemp oil as a defense may end soon as the Drug Enforcement Agency has acted to outlaw the use of any cannabis products that are intended for human consumption.<sup>145</sup> The DEA's position is that any products that contain THC positive hemp are illegal under the Controlled Substances Act (CSA)<sup>146</sup>. The CSA lists THC as a Schedule I controlled substance

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<sup>138</sup> G. Leson, et. al. *Evaluating the Impact of Hemp Food Consumption on Workplace Drug Tests*, 25 J. OF ANALYTICAL TOXICOLOGY (Dec 2001)

<sup>139</sup> Interestingly, the DEA discounted this study as it was funded by the 'hemp industry'. 68 Fed. Reg 14119, 14123. (2003)

<sup>140</sup> Frank Green, *Food Containing Hemp Face Impending DEA Ban*, San Diego Union-Tribune, March 28, 2003 at C1.

<sup>141</sup> Id.

<sup>142</sup> David Armstrong, *Hemp Trade Nipped in the Bud*, S.F. Chronicle, Aug. 25, 2002 at G1. Whole Foods has temporarily stopped stocking hemp food products while the legal status of these foods is being disputed by the Drug Enforcement Agency.

<sup>143</sup> Chuck Haga, *Loaf of Wonder Food or Slice of Contraband? Proponents Say Hemp is Helpful to Your Health, But that Makes the Feds Frown*, STAR TRIBUNE (MINNEAPOLIS- ST. PAUL), April 17, 2003 at A1. There is no report that people who have ingested the bread have been tested.

<sup>144</sup> Id. However, there is no report that people who have ingested the bread have been tested and the indication that the food and seeds are virtually THC-free obviously means that the products still contain some THC.

<sup>145</sup> 68 Fed Reg 14119 (2003) (to be codified at 21 C.F.R. § 1308.35)(rules to become effective April 21, 2003) The DEA has exempted from the Controlled Substances Act non-consumable hemp products such as paper, rope, clothing, animal feed, and personal care products such as shampoos, soaps, and body lotions.

<sup>146</sup> 21 U.S.C § 811 (2002)

which permits legal use only in strictly regulated conditions.<sup>147</sup> According to the DEA, “disallowing human consumption of Schedule I controlled substances...is an absolute necessity to conform with the CSA and protect the public welfare within the meaning of the Act.”<sup>148</sup> The DEA has exempted from the CSA products that are not intended for human consumption such as paper, rope, animal feed and personal care products.

Personal care products such as lotions, moisturizers, soaps, and shampoos which contain or are labeled hemp are another aspect of the hemp industry. The Body Shop has a full line of hemp body care products.<sup>149</sup> The future of these products and their ability to cause positive drug test results are not clearly defined. The DEA recognizes “there is no reliable source of information on these products.”<sup>150</sup> “[W]hether the use of the product results in THC entering the human body, (the) DEA is unaware of any scientific evidence that definitively answers this question.”<sup>151</sup> The DEA has exempted these products from the CSA prohibition on the assumption that they do not cause THC to enter the human body since there is currently no scientific evidence that the products have this result.<sup>152</sup> The DEA seems to be ignoring the prior history of hemp seed oil.

The hemp industry has contested the validity of the DEA rule claiming that Congress has not outlawed the consumption of industrial hemp which has a lower THC and is non-

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<sup>147</sup> “At present, Marinol is the only THC-containing drug product that has been approved for marketing by the FDA. Marinol is the brand name of a product containing synthetic dronabinol (a form of THC) in sesame oil and encapsulated in soft gelatin capsules.” Marinol is listed under Schedule III and therefore has less CSA regulatory requirements governing its use as a medicine. 68 Fed Reg at 14119 (2003)

<sup>148</sup> 68 Fed. Reg at 14119 (2003) (allowing for exceptions for FDA approved drugs and for FDA approved experiments by DEA registered researchers.)

<sup>149</sup> David Armstrong, *Hemp Trade Nipped in the Bud*, S.F. Chronicle, Aug. 25, 2002 at G1.

<sup>150</sup> 68 Fed. Reg at 14122.

<sup>151</sup> Id.

<sup>152</sup> Because the DEA has included those intended for human consumption as illegal but exempted personal care products, the Body Shop may need to evaluate its hemp lip balm to determine which side of the line the product falls upon. The product can be viewed at [www.usa.thebodyshop.com](http://www.usa.thebodyshop.com) (type in hemp lip balm in the product search engine) (last viewed April 27, 2003)



psychoactive.<sup>153</sup> The Ninth Circuit has granted an injunction against enforcement of the final rule.<sup>154</sup> Because most growing any form of hemp is illegal in the United States, most of hemp seeds and oil are imported from Canada.<sup>155</sup> One Canadian exporter of hemp products is suing the U.S. government for restraint of trade in violation of the North American Free Trade Agreement (NAFTA).<sup>156</sup>

Like the military members who inadvertently served as the test subjects for the above products, there may have been other employees who tested positive when they did not knowingly use cocaine or marijuana. The American Association of Medical Reviewing Officers was concerned that the 'hemp oil' defense would invalidate the results of any urinalysis test results for marijuana.<sup>157</sup> Employees have to hope that their ingestion occurs close enough in time to the publication of reputable scientific articles to explain the ingestion. The problem is that several years may pass from the time the product appears until the scientific articles are published. Employees may try to bolster a claim of non-use by relying on the "Health Inca Tea" type of explanation.<sup>158</sup>

One employee tried to explain his urinalysis was positive for the presence of marijuana metabolites because of his ingestion of 'bush tea.'<sup>159</sup> The employee explained that he used some

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<sup>153</sup> David Kelly, *Effort to Revive Hemp Industry Encounters Stigma of Marijuana*, L.A. TIMES, November 17, 2002 at B1. ("Industrial hemp has about 0.3% THC, while marijuana hemp, which belongs to the same plant family, has 5% to 20%).

<sup>154</sup> *Ninth Circuit Blocks DEA Hemp Rule*, U.S. NEWswire, April 17, 2003. (also available at 2003 WL 3730222)

<sup>155</sup> David Armstrong, *Hemp Trade Nipped in the Bud*, S.F. Chronicle, Aug. 25, 2002 at G1.

<sup>156</sup> *Id.* Even if successful the NAFTA lawsuit because it is brought by a private party could not overturn the law, however a lawsuit by the government of Canada could.

<sup>157</sup> *See*, MRO Alert January 1998. The Alerts also show that the AAMRO is not an unbiased organization but actively supports drug testing and actively attacks any defenses to positive tests.

<sup>158</sup> The argument would be: I did not use the drug in question. The test for metabolites does not prove that I used or was under the influence at the time. It may have been another something else I ingested. Of course, the argument is always dependent on the terms of the CBA. A CBA that clearly establishes that a positive test results in termination would leave little room for this argument. However a search on Westlaw of both published and unpublished labor arbitration cases did not reveal any references to "hemp oil".

<sup>159</sup> *Hess Oil Virgin Islands Corp. v. United Steelworkers of America, Local 8526*, 1992 WL 72650 (Arb.) (Nolan, Arb.)

'bush tea' made by a neighbor for congestion. The arbitrator found that the story was implausible and without the 'enlightening' testimony of the bush doctor was unbelievable. The arbitrator also noted that scientific evidence showed that based on his urinalysis result of 180 ng/ml the employee would have felt some effects and therefore should not have reported to work. However the arbitrator gave hope to future employees who have better evidence of an accidental ingestion. "[A] completely accidental violation of [the employer's drug policy] might not justify discharge. If the Grievant truly did not know he had consumed marijuana, for example, firing him for a positive test result might not be fair."<sup>160</sup>

#### **E. Racial Bias in Hair Testing**

One issue that has drawn a lot of recent attention is the issue of whether hair testing has a racial or color bias so that people with dark hair have higher test results than people with fairer hair. An early study by a researcher from the National Institute of Drug Abuse found that cocaine concentrations in both head and arm hair were significantly higher in African Americans than in Caucasian Americans.<sup>161</sup> The study was unable to conclude if the results were due to differences in the amount of cocaine used or ethnic differences. There are a substantial number of conflicting studies on this issue. Even among researchers who agree that there is a racial bias in hair testing results there are different theories as to why drugs may incorporate differently into hair. One theory is that the drugs bind with melanin the pigment that causes different hair colors and another theory is that the drug incorporation may be influenced by cultural differences in hair treatment.

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<sup>160</sup> Id.

<sup>161</sup> Edward J. Cone et. al. *The Occurrence Of Cocaine, Heroin And Metabolites In Hair Of Drug Abusers*, 63 FORENSIC SCIENCE INTL. 55 (1993).

Hair color involves “the presence of various types of melanin in different concentrations and proportions.”<sup>162</sup> However, melanin accounts for only a small portion of total hair weight.<sup>163</sup> Studies have conclusively shown that melanin binds drugs but the binding process is variable with the drug type. Drugs also bind to hair in the absence of melanin. However the comparison of pigmented melanin containing hair to non-pigmented hair shows a distinct difference in drug concentrations.<sup>164</sup> One study conducted a statistical analysis of several other hair studies involving cocaine, ecstasy, heroin, methamphetamine, amphetamine and their metabolites. The authors concluded: “It is our view that color plays a role in the accumulation of drugs in hair. However it is likely to account for only a very small part of the complex process of drug accumulation as the effect so far has been statistically undetectable.”<sup>165</sup> At least one researcher has objected to describing the melanin differential as a ‘racial bias’ arguing that all dark, high melanin content hair, seems to incorporate drugs to the same degree.<sup>166</sup>

Cultural differences may also affect the ability to detect drugs through the hair testing process. “Generally, the hair of Caucasian males or females incorporate much less drugs than do African American females.”<sup>167</sup> Although this was initially thought to be due to hair color, further analysis showed the result was independent of hair color.<sup>168</sup> Another study of drug users in outpatient maintenance programs found significantly higher levels of cocaine in African

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<sup>162</sup> Tom Mieczkowski & Richard Newel, *Statistical Examination of Hair Color as a Potential Biasing Factor in Hair Analysis*, 107 FORENSIC SCIENCE INTL. 13, 14 (2000).

<sup>163</sup> Id. at 14 (“a 0.1-5% range for the mass fraction of melanin”)

<sup>164</sup> Id. at 36.

<sup>165</sup> Id. at 36.

<sup>166</sup> Tom Mieczkowski, *Does ADAM Need A Haircut? A Pilot Study Of Self-Reported Drug Use And Hair Analysis In An Arrestee Sample*, 32 J. OF DRUG ISSUES 97 (2002) (“There is no data to show a purely racial discernment – that two persons with black hair, for example, would bind a drug differentially simply because they had a different ‘racial identity’.”)

<sup>167</sup> David A. Kidwell et. al., *Evidence for Bias in Hair Testing and Procedure to Correct Bias*, 107 FORENSIC SCIENCE INTL. 39, 40 (2000).

<sup>168</sup> Id. at 41. (“The black hair from the Asian-Caucasian male absorbed much less cocaine or morphine than the black hair from the African American female, yet the colors were similar on inspection.”)

American patients as compared to Caucasian patients.<sup>169</sup> Another study used controlled dosages of cocaine and found a statistically different between the amount of cocaine incorporated in non-Caucasian and Caucasian hair.<sup>170</sup> However other researchers conducted a different statistical interpretation of the results and concluded there was no statistical difference. A wide variety of studies of university students and employees, children living in drug contaminated environments and homeless shelter occupants has shown that African Americans are more likely to test positive for cocaine in hair analysis testing than Caucasian Americans. The difference has ranged from 3.2 times to 8 times more likely. One explanation for this difference is cultural differences in hair treatment. "African American females tend to cosmetically treat their hair more frequently than other groups, primarily by straightening. Chemical hair straighteners and perming solutions use strongly basic solutions which have been shown to increase cocaine binding."<sup>171</sup> Additionally, bleaching can cause reduction in the presence of opiates and cocaine and its metabolites.<sup>172</sup> Coupled with the difference due to melanin levels, bottled blondes may therefore have the lowest levels of any hair type.

An alternative theory is that the difference in test results is due to the cultural difference of drug preference and not hair care.<sup>173</sup> The researchers concluded based on a comparison of hair samples and urine samples from randomly selected samples. This theory of drug preference is also supported by one of the same researchers<sup>174</sup> in a study of arrestees in Pinellas County,

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<sup>169</sup> Id. (citing E.J. Cone et. al, *The Occurrence Of Cocaine, Heroin, And Metabolites In Hair Of Drug Abusers*, 63 FORENSIC SCIENCE INTL. 55 (1993).

<sup>170</sup> Id at 44.

<sup>171</sup> Id at 56.

<sup>172</sup> R. Wenning, *Potential Problems With The Interpretation Of Hair Analysis Results*, 107 FORENSIC SCIENCE INTL. 5, 10 (2000).

<sup>173</sup> Raymond C. Kelly, *Hair Analysis For Drugs Of Abuse. Hair Color And Race Differentials Or Systematic Differences In Drug Preferences?* 107 FORENSIC SCIENCE INTL. 63 (2000)

<sup>174</sup> Tom Mieczkowski is a co-author with Raymod C. Kelly in the above article.

Florida.<sup>175</sup> This study found that “although blacks test at higher positive rates than whites for both hair and urine assays, these differentials most likely reflect differential rates of use of cocaine which is apparent from the self-reported data.”<sup>176</sup>

This is a break through area of science. Each side of the debate has several studies to cite and flaws to flaunt from the opposing sides’ studies. The studies that support no racial bias in hair testing are often sponsored by the drug testing industry.<sup>177</sup> Both employers and unions need to be aware of the controversy of the area.

#### **F. Employer Process Violations**

Arbitrators have been more likely to find there was no ‘just cause’ when employers have violated their own process and procedures. The doctrines of due process and fairness are inherent in the just cause standard. Employers will be required to perform in accordance with their policies and procedures. However, the violations of the due process must be substantial and not simply minor transgressions. Whether an error is a material one will be disputed by the union and the employer.<sup>178</sup> Employers who adopt the federal Department of Transportation rules and regulations will be held to those standards.

These propositions are illustrated in a case in which Arbitrator Nadelbach ordered reinstatement without backpay and conditioned on a clear result from a newly administered drug

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<sup>175</sup> Tom Mieczkowski & Richard Newel, *An Evaluation Of Patterns Of Racial Bias In Hair Assays For Cocaine: Black And White Arrestees Compared*, 63 FORENSIC SCIENCE INTL. 85 (1993).

<sup>176</sup> Id. at 85.

<sup>177</sup> For example Raymond C. Kelly is employed by Associated Pathologies Laboratory, a company that conducts hair and urine drug testing.

<sup>178</sup> See, William K. Hanna Trucking Co. v. Teamsters Local Union No. 135, 1995 WL 710742 (Arb.) (Brunner, Arb.) CBA Appendix called for both ‘local management’ and a ‘division safety manager’ to determine if accident was of such magnitude to require drug testing. Employer was a small business with less than 12 management members. Arbitrator found determination to test made by same individual who ‘wore both hats.’ Also issue that nurse at collection facility was married to company vice president had appearance of impropriety but did not affect validity of test especially since relationship was known to union for several years and was never objected to.

test.<sup>179</sup> The employer's 'driver safety manual' incorporated all of the Department of Transportation rules and the Federal Motor Carrier Safety regulations. The regulations established the legal right to have a positive result retested through a confirmatory process at a different laboratory.<sup>180</sup> A medical reviewing officer testified that he did not know if he advised the employee of this legal right, failed to note if he had and that usually he would record this notification. Arbitrator Nadelbach concluded that the evidence was uncertain and unclear as to whether the employer followed the required procedures and therefore the employer did not carry its burden. The reinstatement was ordered even though the arbitrator implied that the employee had in fact used drugs in violation of the company policy. Similarly, Arbitrator Cipolla ordered backpay without reinstatement when an employee was not advised of his right to a retest pursuant to federal regulations.<sup>181</sup>

#### **G. Employee Use of Adulterants**

Some employees engage in self-help to preempt the results of the drug testing. A wide variety of products are available to feed into an employee's hopes of beating the test. The products include shampoos to wash hair clean, synthetic urine, urine additives and detoxifying drinks or substances.<sup>182</sup> Drug testing firms can and do test urine to determine if adulterants have

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<sup>179</sup> Coca Cola Bottling Co of N.Y., Inc. v. Soft Drink & Brewery Workers Union, Local 812, 110 Lab. Arb. (BNA) 8 (1998) (Nadelbach, Arb.) This case also involved a belated claim of passive inhalation of marijuana that was refuted by the medical reviewing officer's testimony. The arbitrator was not persuaded by the claim

<sup>180</sup> The arbitration report refers to 49 C.F.R. § 40.33(f). The requirement to notify an employee of their right to a test of the split specimen is now at 49 C.F.R. § 40.153 (2003).

<sup>181</sup> Mason & Hangar-Silas Mason Co., Inc. v. Metal Trades Council of Amarillo, Texas 103 Lab. Arb. (BNA) 371 (1994) (Cipolla, Arb.)

<sup>182</sup> One of the strangest products is the "Whizzinator", a prosthetic penis in a variety of skin colors that comes with dehydrated urine and heating pads to allow the user to provide a clean sample even during observed testing. Martha McNeil Hamilton, *Firms Offer Ways to Foil Drug Tests*, Wash. Post, Feb. 18, 2003 at E1.

been used.<sup>183</sup> Most drug testing programs regard the adulteration of a sample to be a refusal to test or the same as a positive result.<sup>184</sup>

Arbitrator Skulina denied the grievance of an employee who admitted to using an adulterant that resulted in the employee testing positive for cocaine.<sup>185</sup> The employee had tested positive for PCP in 1995 and for cocaine in 1997; both resulting in suspensions. The employee then attended a wake where his relatives were smoking marijuana and he was exposed to the smoke. When he was selected for a random urinalysis, he expressed his concerns over the passive inhalation to his friend, who then provided him with a liquid to place in the bottle. The sample tested positive for cocaine. The arbitrator concluded that regardless of whether it was the employee's urine or an attempt to defraud the test, either was a dischargeable offense.

This was not the only employee who adulterated his urine due to concerns about passive inhalation. A Fort Lauderdale firefighter/EMT was fishing with friends on a boat and fell asleep for a few hours only to awaken to a marijuana smoke filled cabin.<sup>186</sup> Concerned about this situation he added 'Klear' to his sample when he was called to give a sample five days later.<sup>187</sup> The laboratory reported that his sample had been adulterated and his employer discharged him. The arbitrator stated: "Nothing in the record suggests [the employee was at the time of the test] or at any previous time during his employment by the Department a drug user. His passive inhalation was one of those unfortunate and unanticipated happenings which people occasionally

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<sup>183</sup> Id. Nine states also have laws that make the adulteration of drug tests a criminal offense. Id.

<sup>184</sup> See, 49 C.F.R. § 40.23(b) "As an employer who receives a verified adulterated or substituted drug test result, you must consider this a refusal to test..."

<sup>185</sup> Teamsters Local Union No 436 v. Cuyahoga County Engineer, 1998 WL 1041420 (Arb) (Skulina, Arb.)

<sup>186</sup> City of Fort Lauderdale, 115 Lab. Arb. (BNA) 418 (2001)(M, Arb.)

<sup>187</sup> Klear is a urine additive that is supposed to prevent the sample from testing positive. At least one of the websites that sells urine adulterants warns that Klear is detectable by most drug testing facilities. [www. Testclear.com](http://www.Testclear.com) (last viewed April 27, 2003).

experience.”<sup>188</sup> The arbitrator mitigated the discharge to discipline finding based on all the mitigating factors the employer did not have just cause to discharge.

## II. Public Policy Challenges to Arbitrators’ Awards

Even if the Employee is successful in front of the arbitrator, the Employer may seek review of the arbitrator’s decision in federal court. Decisions which are ‘wrong’, even if egregious, are not a sufficient basis for being overturned.<sup>189</sup> The courts will look at evidence that shows that the arbitration process was disrupted. The courts will consider allegations that the arbitrator’s award contradicts the labor agreement, went beyond the assignment, or if the arbitrator engaged in dishonesty.<sup>190</sup> Employers have also challenged arbitrators’ decisions for violating “public policy.” The Supreme Court has limited challenges based on public policy in two cases based on the reinstatement of employees who had been accused of drug related violations.

In United Paperworkers International Union v. Misco<sup>191</sup>, a unanimous Supreme Court limited the ability of courts to overturn labor arbitration awards based on public policy. The case did not involve drug testing but concerned an employee who was found by the police on company property in the back seat of a fellow employee’s car with a burning marijuana cigarette in the front seat.<sup>192</sup> The employee was an operator of a dangerous slitter-rewinder machine at the paper converting plant.<sup>193</sup> The employee’s own car also possessed marijuana but the employer was not aware of this evidence when it discharged their wayward employee. The arbitrator

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<sup>188</sup> Id.

<sup>189</sup> Paula A. Barran & Todd A. Hanchett, *Public Policy Challenges to Labor Arbitration Awards: Still a Safe Harbor for Silly Fact Finding?*, 38 Willamette L. Rev 233, 233 (2002).

<sup>190</sup> Id.

<sup>191</sup> 484 U.S. 29 (1987)

<sup>192</sup> Id. at 34.

<sup>193</sup> Id. Several employees had been injured on the machine.



concluded that the employee's presence near the burning bud was not sufficient evidence for use or possession of drugs on company property and refused to consider the after action discovery of the evidence from the employee's own car.<sup>194</sup> The arbitrator ordered the employer to reinstate the operator with back pay and full seniority.

The employer challenged this decision in federal district court and the district court vacated the award. The Fifth Circuit affirmed based on the public policy of not allowing the operation of dangerous machinery while under the influence of drugs.<sup>195</sup> The Supreme Court reversed. The Supreme Court reasoned that "because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept."<sup>196</sup> The courts cannot reject the arbitrator's decision simply because it believes that the arbitrator misread the contract nor if the court disagrees with the findings of fact.<sup>197</sup> The arbitrator is also free to set the procedural rules including what evidence to consider. As long as the arbitrator is "arguably construing or applying the contract and acting within the scope of his authority", then the courts should uphold the award.<sup>198</sup> Fraud or dishonesty is a basis for overturning the arbitrator's decision.

The Supreme Court acknowledged that common law doctrine allowed a court to refuse to enforce an arbitration decision that was contrary to public policy. However this exception is limited to situations where enforcement of the award would violate some 'explicit public policy' that is 'well defined and dominant' and is developed by reference to laws and legal precedents

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<sup>194</sup> Id. The police had found the marijuana in the employee's car before the employer discharged, but the employer was not aware of this additional evidence until after it took action. The employee had originally only told the employer he was arrested for possession of marijuana in his home.

<sup>195</sup> Id at 35.

<sup>196</sup> Id.

<sup>197</sup> Id at 38.

<sup>198</sup> Id at 38.

not simply from general concerns of public interests.<sup>199</sup> In this case, the Court of Appeals had not followed this restriction in showing a violation of public policy.

After Misco, a few Courts of Appeals overturned arbitration awards in cases involving the reinstatement of employees who had tested positive for drug use. The First Circuit vacated the reinstatement of employee who tested positive for cocaine.<sup>200</sup> The Fifth Circuit on vacated an award that reinstated employees who tested positive for cocaine use to a safety sensitive position.<sup>201</sup> The Fifth Circuit found a public policy that forbade the placement of an employee who used drugs in a safety-sensitive position and a public policy against “retrospective approval” of the prior unsafe activity.<sup>202</sup> In a case involving a helmsman of an oil tanker who tested positive for marijuana, the Third Circuit based its public policy on both public safety and environmental protection.<sup>203</sup> These decisions generally met with approval from commentators but not from unions.<sup>204</sup>

The Supreme Court examined the issue of public policy again in the context of drug testing in Eastern Associated Coal Corp v. United Mine Worker’s of America.<sup>205</sup> The employee drove heavy vehicles on public highways and tested positive twice for marijuana in slightly more than a year’s time. After each positive result, the employer had discharge their pot smoking employee only to have the arbitrator order reinstatement. The Court clarified that public policy doctrine looks at the arbitrator’s award, which is indistinguishable from the contractual

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<sup>199</sup> Id at 42. (referencing W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983) and Muschany v. United States, 324 U.S. 49 (1945)).

<sup>200</sup> Exxon Corp v. Esso Worker’s Union, Inc., 118 F.3d 841 (1<sup>st</sup> Cir 1997)

<sup>201</sup> Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5<sup>th</sup> Cir 1993); *cert. denied* 510 U.S. 965 (1993).

<sup>202</sup> Exxon Corp. v. Baton Rouge Oil and Chem. Worker’s Union, 77 F.3d 850 (5<sup>th</sup> Cir 1996)

<sup>203</sup> Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357, 364 (3<sup>rd</sup> Cir 1993) (The Third Circuit based its finding of a public policy, in part, on Coast Guard regulations even though the urinalysis tested below the Coast Guard cutoff level which was higher than Exxon’s standards.) See, Thomas E. Claps, Note, *Survey of Recent Developments in Third Circuit Law: Labor Law – Arbitration Awards*, 24 SETON HALL L. REV. 541 (1993).

<sup>204</sup> See, Thomas E. Claps, Note, *Survey of Recent Developments in Third Circuit Law: Labor Law – Arbitration Awards*, 24 SETON HALL L. REV. 541 (1993).

agreement, and not the underlying misconduct that served as the basis for the discharge.<sup>206</sup>

Although Congress and the Department of Transportation's implementing regulations set forth a public policy of eliminating the use of illegal drugs, whether on or off duty, by employees who drive trucks, the laws and regulations did not forbid an employer from reinstating an employee who had tested positive twice.<sup>207</sup> The award therefore did not violate any specific provision of law and was consistent with Department of Transportation rules. The award did punish the employee and did "not condone [the employee's conduct] or ignore the risk to public safety that drug use by truck drivers may pose."<sup>208</sup> The Supreme Court held that the reinstatement did not violate public policy. Justice Scalia, with Justice Thomas, concurred but clarified that in their view the public policy exception was limited solely to a violation of positive law.<sup>209</sup>

Even after Eastern Coal, the circuit courts have considered further employer challenges based on public policy to arbitrators' decisions reinstating employees who use illegal drugs. However, it appears that as long as the arbitrator delivers some disciplinary sanction then the award will not violate public policy.<sup>210</sup>

Both the Fifth Circuit<sup>211</sup> and the Ninth Circuit<sup>212</sup> have indicated that an arbitrator's award that did not dispense some discipline may be subject to a public policy challenge. The Fifth Circuit upheld an arbitrator's decision to reinstate a safety sensitive employee who had been

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<sup>205</sup> 531 U.S. 57 (2000).

<sup>206</sup> Id. at 62-63. ("To put the question more specifically, does a contractual agreement to reinstate [the employee] with specified conditions [as set forth in the arbitrators' award]...run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?")

<sup>207</sup> Id. at 65 (referencing the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, § 2(3), 105 Stat. 953)

<sup>208</sup> Id. at 65.

<sup>209</sup> Id. at 68 (Scalia, J., concurring).

<sup>210</sup> Paula A. Barran & Todd A. Hanchett, *Public Policy Challenges to Labor Arbitration Awards: Still a Safe harbor for Silly Fact Finding?*, 38 Willamette L. Rev. 233, (2002).

<sup>211</sup> Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union Local 627, 742 N.E. 2d 630 (Ohio 2001)

<sup>212</sup> Southern California Gas Co. v. Utility Workers Union of America, Local 132, 265 F.3d 787 (9<sup>th</sup> Cir. 2001)

discharge after testing positive for drug metabolites. The Fifth Circuit stated: "We hold that Ohio has no dominant and well-defined public policy that renders unlawful an arbitration award reinstating a safety-sensitive employee who was terminated for testing positive for a controlled substance, assuming that the award is otherwise reasonable in its terms for reinstatement."<sup>213</sup> The court implied that the award was otherwise reasonable because it denied back pay, required rehabilitation, a return-to-work drug test, and increased random drug tests.

The Ninth Circuit enforced an arbitrator's award that reinstated two employees to safety-sensitive positions who tested positive for drugs during their urinalysis.<sup>214</sup> In this case the employer had adopted the Department of Transportation regulations which in part include that the Medical Reviewing Officer who certifies the drug test results must be a licensed medical doctor. The MRO was in fact not a licensed doctor and was arrested for impersonating a doctor.<sup>215</sup> The employer had an actual doctor review the prior results and notes of the bogus physician.<sup>216</sup> The arbitrator determined that the employer had not followed the Department of Transportation procedures and therefore the results could not be considered as positive test results. The Ninth Circuit enforced the arbitrator's award and denied the public policy challenge. It agreed that the two employees could not be considered as confirmed drug users because the testing procedures invalidated the results. The majority implied that the answer may have been different if the arbitrator had reinstated two employees who had valid drug tests. The dissent concluded the reinstatement "directly conflicts with the clear language of the applicable collective bargaining agreement and violates firmly established public policies against such

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<sup>213</sup> 742 N.E. 2d 630, 636.

<sup>214</sup> 265 F.3d 787.

<sup>215</sup> This is the same bogus physician discussed above in Section III. Defenses A. Attacking the Lab

<sup>216</sup> One of the issues at arbitration was whether the union had agreed that the actual physician's review of the tests would be an adequate replacement for the error and would be a final decision as to the accuracy of the results. The employer used a 'no harm, no foul' type of argument.

reinstatement.”<sup>217</sup> The public policy was defined in DOT regulations that required the removal of an employee in a safety-sensitive position who tested positive on a drug test.

The employee therefore may want to avoid a challenge in the court to the arbitrator’s award by strategically asking for results in the alternative. The employee could challenge the test results before the arbitrator. If the arbitrator believes that the results do not indicate drug use or that the results are not a violation of the contract then no punishment is necessary or appropriate. If the arbitrator does not make those findings, the employee’s interest may be served by requesting some limited punishment in the alternative.

### **III. Conclusion**

The issue of employee discipline due to drug testing results is a an active area of labor arbitration cases. Private employers engage in drug testing due to federal requirements or based on their own concerns. The science that supports the basic ideas of drug testing, that the ingestion of drugs produces metabolites that are excreted in various bodily fluids, is widely accepted. However, the devil is in the details. The science that goes into the various interpretations of the drug test results is still being debated in academic and scientific circles. Individual theories and concerns about various drug testing issues will continue to develop. The employees, unions and employers will present arbitrators with a variety of defenses. The strength of these defenses will rest in part on the science behind these defenses. Of course, the believability of the story, the credibility of the witnesses and other factors will have a large influence on the arbitrator’s decision as well. Employee representatives are better able to represent their clients if they are aware of the science and can present the facts to both the arbitrator and the grievant. Employers are better prepared to defeat a ‘smoke screen’ defense

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<sup>217</sup> Id. at 797 (Alarcon, dissenting)

when they can present scientific testimony through the medical reviewing officer or the literature itself to the arbitrator.